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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER SEELIG,

Defendant and Appellant.

A153837

(Alameda County  
Super. Ct. No. 17CR021756)

This is an appeal from the judgment and sentence imposed on defendant Christopher Seelig after a jury found him guilty of being a felon in possession of a firearm (count 3) and illegal possession of ammunition (count 4). The trial court then sentenced defendant to a total prison term of three years eight months. On appeal, defendant challenges as an abuse of discretion the trial court's decision to impose the upper three-year term on count 3. We affirm.

**FACTUAL AND PROCEDURAL BACKGROUND**

On September 18, 2017, a criminal information was filed charging defendant with: making criminal threats (Pen. Code, § 422)<sup>1</sup> (counts 1 and 2); being a felon in possession of a firearm (§ 29800, subd. (a)(1)) (count 3); and illegal possession of ammunition (§ 30305, subd. (a)(1)) (count 4). As to counts 1 and 2, the information further alleged a firearm use enhancement.

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<sup>1</sup> All statutory citations herein are to the Penal Code.

Trial revealed the following facts relevant on appeal. Defendant lived in an apartment building in Oakland across the street from a mosque. At about 10:30 p.m. on July 15, 2017, two members of the mosque were outside cleaning up debris in the area around the mosque, with plans to eventually take this debris to the dump before the next day's morning service. The members noticed a man, later identified as defendant, sorting or rummaging through one of the garbage cans the members had been using in their clean-up effort. The members confronted defendant about whether he was adding trash to their garbage can, and a verbal confrontation ensued, ending when defendant stormed off in the direction of his apartment building. When defendant returned a few minutes later, he brandished a firearm, which had a laser tracker, at the torso of one of the members, and referred to them using racial slurs, including the "N" word. Their altercation ended abruptly when a neighbor began yelling. Defendant fled to his apartment building, where he discarded his firearm on the roof.

A short time later, one of the members called the police after seeking guidance from one of the mosque's ministers. Numerous police officers subsequently arrived at the scene and surrounded defendant's apartment building. A tense standoff lasting over two hours ensued, during which defendant refused to leave the apartment of T.K., the mother of his young child who lived in the same building and was home with their child that evening. Eventually, however, defendant emerged from the apartment, T.K. and their child were taken to safety, and defendant was arrested and detained. Afterward, police officers obtained a search warrant and searched defendant's apartment, finding two holsters, several magazines of ammunition for an AR-15 semiautomatic rifle, pistol grips, a gun carrying case, and gun oil.

At trial, defendant testified that he illegally owned a gun and had two prior felony convictions. He also admitted having gun paraphernalia and ammunition, but he claimed he did not have a semiautomatic weapon and bought the AR-15 magazine by mistake. Defendant also admitted using the "N" word toward the members during their confrontation, but he insisted he did not often use that word and did so only because he

was scared. He also acknowledged asking T.K. in recorded phone calls from jail to get rid of his gun, which he had thrown on the apartment roof.

On December 20, 2017, the jury found defendant guilty of counts 3 and 4 but was unable to reach a verdict on counts 1 and 2, prompting the court to declare a mistrial as to those counts.

On February 8, 2018, the trial court sentenced defendant to a total prison term of three years eight months.<sup>2</sup> This timely appeal followed.

## **DISCUSSION**

Defendant argues on appeal that the trial court abused its discretion by imposing an aggravated term on count 3, being a felon in possession of a firearm, based on evidence “based primarily on his alleged conduct toward [the members] in counts 1 and 2—criminal threats charges as to which the jury never reached verdicts.” In addition, defendant argues, and the People concede, the trial court erred by failing to pronounce orally whether he was entitled to presentence conduct credits and, if so, how many. We address each issue below.

### **I. Imposition of the Upper Term on Count 3**

The legal framework with respect to the trial court’s imposition of the upper term is well established. The trial court has wide discretion in weighing aggravating and mitigating factors, and its exercise of discretion will be disturbed on appeal only if it has been abused. (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582.) “As under the former [statutory] scheme, a trial court will abuse its discretion under the amended scheme if it relies upon circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision. (See, e.g., *People v. Colds* (1981) 125 Cal.App.3d 860, 863 [178 Cal.Rptr. 430] [it is improper to consider a waiver of jury trial in mitigation, or an exercise of the right to jury trial as aggravation]; *People v. Johnson* (1988) 205 Cal.App.3d 755, 758 [252 Cal.Rptr. 302] [‘defendant’s alienage is

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<sup>2</sup> On June 27, 2018, the trial court granted the prosecution’s motion to dismiss counts 1 and 2.

not a proper factor when considering the length of his term’].) A failure to exercise discretion also may constitute an abuse of discretion.” (*People v. Sandoval* (2007) 41 Cal.4th 825, 847–848, first bracketed insertion added.)

On appeal, we review the record only for substantial evidence supporting the aggravating factors relied upon by the trial court to support its sentencing decision. “Under the DSL [Determinate Sentencing Law], a trial court is free to base an upper term sentence upon any aggravating circumstance that the court deems significant, subject to specific prohibitions. (See, e.g., Cal. Rules of Court, rule 4.420(c) [fact underlying an enhancement may not be used to impose the upper term unless the court strikes the enhancement]; *id.*, rule 4.420(d) [fact that is an element of the crime may not be used to impose the upper term].” (*People v. Sandoval, supra*, 41 Cal.4th at p. 848.) We also keep in mind that just one valid aggravating factor will justify imposition of an upper term. (*People v. Black* (2007) 41 Cal.4th 799, 815.) “The court’s discretion to identify aggravating circumstances is otherwise limited only by the requirement that they be ‘reasonably related to the decision being made.’ (Cal. Rules of Court, rule 4.408(a).)” (*People v. Sandoval*, at p. 848.) In determining “ ‘whether there are circumstances that justify imposition of the upper or lower term,’ ” the trial court may consider, among other things, “the record of the trial, the probation officer’s report, and statements submitted by the defendant, the prosecutor, and the victim or victim’s family. (§ 1170, subd. (b).)” (*Ibid.*)

Turning to the record at hand, defense counsel argued for a mitigated sentence in defendant’s case, noting, among other things, that defendant had no significant prior criminal record in California and that his two prior felonies were in Ohio for drug possession, crimes eligible in California for reduction to misdemeanors. Defense counsel also noted that defendant had taken the stand during trial and taken responsibility for possessing an illegal firearm and ammunition. The prosecution argued for an aggravated sentence based on several factors noted in the probation report that had been submitted in advance of the hearing, including the fact that defendant had numerous prior convictions that were increasing in seriousness. Defense counsel objected that the probation report

contained information related to the criminal threats counts as to which the jury failed to reach verdicts, and asked the court to strike this information from the record.

At the February 8, 2018 sentencing hearing, the trial court denied defendant's request to strike information from the probation report, explaining, "[S]o the information in the report is some background information, and the court is taking into account all of the circumstances around the possession of the firearm and the possession of the ammunition, which are the charges that he was convicted on, and also his statements that were made during the course of the trial which were under oath." Then, after allowing the victims and their family members to address the court, the trial judge imposed a total sentence of three years eight months, representing the three-year aggravated term on count 3, plus eight months, representing one-third the midterm on count 4, to be served consecutively.

As mentioned, defendant argues the trial court abused its discretion when imposing the three-year upper term on count 3 by relying on facts that "primarily" supported the two criminal threats counts on which the jury failed to reach a verdict. We disagree. The facts relied upon by the court, as it stated on the record, include the following: (1) defendant needlessly escalated a verbal confrontation by retrieving the gun from his apartment and returning from the safety of his apartment to the scene of the confrontation, where he then brandished the gun and directed a "vile and hateful racial epithet" at the victims (Cal. Rules of Court, rule 4.414(a)(6)); (2) defendant's actions went far beyond mere possession of a firearm and extended to aiming the weapon at the torsos of the victims and directing a laser attachment at them for a "terrifying effect" (*id.*, rule 4.421(a)(1)); (3) defendant was armed with a .45-caliber handgun at the time of the crime and had in his apartment a loaded .45-caliber magazine, an AR-15 magazine and numerous .45-caliber bullets (*id.*, rule 4.421(a)(2)); (4) his conduct, which included possessing and discarding his firearm in a residential building and near a house of worship, was of such a violent and serious nature that it indicated a serious danger to society (*id.*, rule 4.421(b)(1)); (5) defendant later unlawfully interfered with the judicial process by attempting to dissuade T.K. from cooperating with law enforcement and

asking for her help in destroying or hiding his firearm (*id.*, rule 4.421(a)(6)); (6) he has two prior felony convictions and nine prior misdemeanor convictions, which are of increasing seriousness (*id.*, rule 4.421(b)(2)); (7) he was on probation at the time of the crime (*id.*, rule 4.421(b)(4)); and, lastly, (8) he has failed to demonstrate remorse for aiming a firearm at the victims (whom he described as “ ‘very hateful’ ”), notwithstanding the remorse he expressed at trial for using the “N” word.

Based upon this largely undisputed record, defendant’s argument fails, as no further evidentiary showing is required to affirm the trial court’s exercise of discretion. As explained above, even a single appropriate factor is sufficient to support an aggravated term. (*People v. Williams* (1991) 228 Cal.App.3d 146, 152–153.) Thus, even assuming for the sake of argument that one or more of the factors relied upon by the court is, in defendant’s words, “primarily” relevant to the criminal threats counts, the fact remains that multiple factors, supported by the record, relate to defendant’s unlawful possession of a firearm and ammunition and, thus, were properly relied upon by the trial court.<sup>3</sup> (See *In re Coley* (2012) 55 Cal.4th 524, 557 [a trial court, in exercising its sentencing discretion, “may take into account the court’s own factual findings with regard to the defendant’s conduct related to an offense of which the defendant has been acquitted,” so long as the evidence establishes such conduct by a preponderance of the evidence].)

The record establishes that defendant did not merely possess this firearm and ammunition. He admittedly directed the loaded gun at the victims while verbally attacking both men with a hateful, racial word, and while standing in front of a residential apartment building and house of worship. These are just the sort of factors that, pursuant to California Rules of Court, rule 4.421(a) and (b), support a trial court’s imposition of an

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<sup>3</sup> We reject defendant’s suggestion that, based on its factual findings at the sentencing hearing, the trial court “probably” would be “subject to recusal in a subsequent retrial on the mistried counts.” Defendant fails to support his suggestion with any legal authority, much less provide a reasoned argument as to why it would support reversal of the trial court’s judgment and sentence in this case (it does not).

aggravated term. (E.g., Cal. Rules of Court, rule 4.421(a)(1) [“The crime involved great violence, great bodily harm, threat of great bodily harm”], (b)(1) [“defendant has engaged in violent conduct that indicates a serious danger to society”].) Moreover, under California Rules of Court, rule 4.421(c), the trial court may rely on “[a]ny other factors statutorily declared to be circumstances in aggravation *or that reasonably relate to the defendant or the circumstances under which the crime was committed.*” (Italics added.) As such, the trial court could also have reasonably relied, for example, on his conduct toward T.K. and their young child during the tense standoff with police that lasted over two hours, which exposed T.K. and the child to a significant risk of harm. (*Ibid.*)

We affirm the trial court’s ruling on this record, as it is well established that where, as here, “the facts surrounding the charged offense exceed the minimum necessary to establish the elements of the crime, the trial court can use such evidence to aggravate the sentence.” (*People v. Castorena* (1996) 51 Cal.App.4th 558, 562.)

## **II. Failure to State on the Record Defendant’s Entitlement to Conduct Credits**

Both parties agree that the trial court erred by failing to state in open court whether defendant is entitled to presentence conduct credits and, if so, how many. They jointly seek remand of this case for a determination by the trial court of defendant’s entitlement to these credits. We grant their request.

As the People acknowledge, it is not clear from the record whether the conduct credits specified in the court’s minutes and abstract of judgment are correct. After awarding defendant 208 days of actual presentence custody credits, the trial court noted that conduct credits “would be determined by the Department of Corrections.” Yet the court did not orally pronounce whether defendant was entitled to conduct credits, much less how many. As a result, remand is appropriate. (*People v. Buckhalter* (2001) 26 Cal.4th 20, 30 [“ ‘[T]he court imposing a sentence’ has responsibility to calculate the exact number of days the defendant has been in custody ‘prior to sentencing,’ add applicable good behavior credits earned pursuant to section 4019, and reflect the total in the abstract of judgment. (§ 2900.5, subd. (d); see also [§ 4019], subd. (a).)”]; *People v.*

*Taylor* (2004) 119 Cal.App.4th 628, 647 [incorrect calculation of custody credits is an unauthorized sentence that may be corrected at any time].)

**DISPOSITION**

We remand this matter to the trial court to determine the number of presentence conduct credits, if any, to which defendant is entitled. In all other regards, the judgment is affirmed.



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Wiseman, J.\*

WE CONCUR:

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Siggins, P. J.

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Fujisaki, J.

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\* Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.